SUPREME COURT, U.S.
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No. 03-___

IN THE

Supreme Court of the United States

Robert R. Krilich, Sr.,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err, as the government conceded below, in holding that petitioner's Section 2255 motion challenging his sentencing was a prohibited "second or successive" habeas application because petitioner supposedly could have raised his sentencing challenge in a previously filed challenge to his conviction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The Appendix reproduces the court of appeals' order vacating the judgment of the district court (Pet. App. 1a-2a, 53 Fed. Appx. 787), the district court's order denying petitioner's Section 2255 motion (Pet. App. 3a-5a), the district court's opinion denying petitioner's Rule 35 motion (*id.* 7a-9a), and the district court's opinion resentencing petitioner (*id.* 10a-20a). The court of appeals denied rehearing en banc on April 21, 2003. *Id.* 6a. On July 11, 2003, Justice Stevens extended the time to file this petition to and including August 19, 2003. App. No. 03-44. This Court has jurisdiction under 28 U.S.C. 1254.

RELEVANT STATUTORY PROVISIONS

Title 28, Section 2255 of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> * * * * *
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rule of Criminal Procedure 35 provides, in pertinent part: "(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." At the time relevant to these proceedings, the rule provided in pertinent part: "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The Advisory Committee Notes specify that the change was not substantive. See *infra* 16 n.5.

STATEMENT OF FACTS

Petitioner Robert R. Krilich, Sr., filed two Section 2255 motions: in 2000, he challenged his conviction ("the conviction 2255"); in 2002, he challenged his subsequent resentencing ("the resentencing 2255"). As a matter of both fact and law, petitioner could not have included the claims set forth in the resentencing 2255 in his earlier-filed conviction 2255 because those claims did not arise for purposes of Section 2255 review until *after* the district court had already decided the conviction 2255. The court of appeals nonetheless held that the sentencing 2255 was a prohibited "second or successive" habeas application.

1. Rules Governing the Submission of Section 2255 Motions. Congress established in 28 U.S.C. 2255 a procedure for federal prisoners to collaterally attack their convictions and sentences. In order to ensure that courts are not unnecessarily called upon to decide Section 2255 motions, the prisoner must first pursue to their conclusion any challenges he intends to raise on direct appeal. "It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending." Brief for the United States, *Clay* v. *United States*, 123 S. Ct. 1072 (2003), at 22 (No. 01-1500). See

Kapral v. *United States*, 166 F.3d 565, 572 (CA3 1999) (collecting cases); see also Rule 5, Rules Governing Section 2255 Proceedings, Advisory Committee Note (1997) (Section 2255 motion "is inappropriate if the movant is simultaneously appealing the decision.").

Once a Section 2255 motion becomes ripe upon the conclusion of direct review, prisoners do not have an unlimited time to institute their collateral attack. The Antiterrorism and Effective Death Penalty Act imposes a one-year statute of limitations. 28 U.S.C. 2255 ¶ 6. The one-year period begins to run from the time the challenged proceeding becomes "final" on direct review. *Id.* As this Court recently made clear in *Clay* v. *United States*, when a federal prisoner on direct review seeks certiorari in this Court, "finality" attaches when certiorari is denied. 123 S. Ct. 1072, 1077 n.4 (2003).

2. Petitioner's Conviction and First Sentencing: Petitioner was convicted of racketeering and of making false statements to a bank in connection with industrial bond revenue financing. Under the version of the Sentencing Guidelines in effect at the time of petitioner's conduct, the sentence was calculated based on the amount of the "bribe or the benefit received, or to be received, in return for the bribe." U.S.S.G. § 2C1.1 (b)(2)(A) (1990 ver.). The district court sentenced petitioner to 64 months' imprisonment based on the judge's finding that the benefit to petitioner from his offense conduct was between $5 and $10 million.

Petitioner appealed his convictions and the government appealed the sentence. The court of appeals affirmed petitioner's convictions, but remanded for resentencing on the ground that the district court's calculation of petitioner's gain was too vague. *United States* v. *Krilich*, 159 F.3d 1020, 1031 (CA7 1998) (*Krilich I*).

This Court denied certiorari on October 4, 1999. 528 U.S. 810 (1999). Petitioner had one year from that date – *i.e.*,

until October 4, 2000 – to challenge his conviction under Section 2255. See 28 U.S.C. 2255 ¶ 6.

3. Petitioner's Conviction 2255: Petitioner filed a Section 2255 motion challenging the constitutionality of his conviction on October 3, 2000. At that time, petitioner's resentencing was not subject to collateral attack because direct review of the resentencing had not concluded: not only had the district court not entered a written judgment on the resentencing, but no appeal had been taken, and this Court had not denied certiorari.

Petitioner recognized in his conviction 2255 motion that "claims made pursuant to 28 U.S.C. 2255 should not normally be split and that a petitioner awaiting resentencing should normally wait until the resentencing judgment has become final before attacking the constitutionality of his underlying conviction." Motion Pursuant to 28 U.S.C. § 2255 To Vacate, Set Aside and Correct Sentence at 2 n.1 (Oct. 3, 2000). But petitioner explained that he was filing his conviction 2255 protectively because his deadline to collaterally attack his conviction could be said to expire one year after the conviction became final – *i.e.*, on October 4, 2000 – rather than when all the proceedings in the case became final. Accordingly, petitioner asked that if the district court deemed his first Section 2255 motion "premature" because it did not include challenges to his resentencing, the court either 1) stay the proceedings on the first Section 2255 motion; or 2) dismiss the first Section 2255 motion with leave to refile as an initial Section 2255 motion at a later time. *Id.* at 3 n.1.

On April 5, 2001, ten and one-half months before petitioner's direct appeal of his resentencing became final upon this Court's denial of certiorari, the district court denied petitioner's conviction 2255 motion on the merits.

4. Resentencing: On remand from the court of appeals' decision in *Krilich I*, the district court applied the then-current version of Guideline § 2C1.1, which had been substantively

amended on November 1, 1991. See U.S.S.G. App. C, Amend. 367. Whereas the previous version of the Guideline had measured sentencing enhancements for bribery by the defendant's gain (with no mention of loss to the government), the revised provision instructed the court to calculate a defendant's sentence based on "the value of the payment, the benefit received or to be received in return for the payment, *or the loss to the government from the offense*, whichever is greatest." U.S.S.G. § 2C1.1(b)(2)(A) (2003) (emphasis added).

a. The judge orally pronounced petitioner's sentence on February 11, 2000. The district court sentenced petitioner to 87 months' imprisonment. Applying the revised Guideline, the district court based the resentencing not on petitioner's supposed gain but "only on the estimated actual *loss* to the government from lost tax revenue (as opposed to the benefit to [petitioner])." Pet. App. 11a (emphasis added). Although petitioner was not subject to the revised Guideline, which went into effect after the conduct for which he was convicted, Seventh Circuit precedent precluded him from seeking to have the sentence corrected under Fed. R. Crim. P. 35 until the judge entered a written judgment. *United States* v. *Clay*, 37 F.3d 338, 340 (1994).

The district court did not enter a written opinion and judgment until November 2000, over eight months after oral pronouncement of the sentence. Pet. App. 10a, 20a. The court's opinion explained that it entered the 87-month sentence on the ground that petitioner "intended the government to lose" the tax revenue. *Id.* 13a. The court thus rejected petitioner's argument that his sentence should not be enhanced under U.S.S.G. § 2C1.1 because "he received no net benefit" from his conduct. Pet. App. 14a. The court "reluctantly conclude[d]" that petitioner "may be correct" that he received no net benefit, but decided that this argument was "legally irrelevant." *Id.* 15a. "Since [petitioner's] offense conduct was intended to cause the government a $14.2

million loss, that amount will be used for applying" the Sentencing Guidelines. Pet. App. 15a.[1]

Petitioner sought to have the sentence corrected under Fed. R. Crim. P. 35. Specifically, on November 6, 2000, petitioner filed a Rule 35 Motion to Correct Sentence, arguing that his sentence violated the Ex Post Facto Clause because it was based on a Guildeline that looked to loss to the government, which was not a sentencing factor at the time petitioner committed his offense, as opposed to the defendant's gain.

On November 13, 2000, the district court denied the Rule 35 motion but abandoned its reliance on the amended Guideline. Critically, the district court purported to engage in new factfinding. Ignoring its previous recognition that petitioner had received no benefit, the district court asserted that "the *benefit* to" petitioner from his offense conduct "was approximately $14 million." Pet. App. 9a (emphasis added). On that basis, the district court reaffirmed the 87-month sentence under the version of the Guidelines it had employed in imposing the first sentence.

b. Petitioner appealed his sentence, arguing *inter alia* that the sentence was imposed in violation of the Ex Post Facto Clause. Petitioner also contended that the district court had exceeded its authority under Rule 35 in making new factual findings. The government cross-appealed from a downward departure imposed by the district court.

The Seventh Circuit rejected petitioner's argument, concluding that "[t]he district court's finding that the gain was $14 million is supported by the record." *United States* v.

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[1] The court relied on "intended loss" rather than "loss" because the government did not actually lose anything. After the oral pronouncement of sentence but before the entry of a written judgment, the Internal Revenue Service had determined that the interest on the industrial revenue bonds at issue in petitioner's case were not tax free. Pet. App. 11a-12a. Therefore, the government did not lose any tax revenue from petitioner's conduct.

Krilich, 257 F.3d 689, 692 (2001) ("*Krilich II*"). But the court of appeals agreed with the government and again vacated petitioner's sentence, remanding with instructions for the district court to impose a sentence in the range of 135 to 168 months.[2]

The Seventh Circuit's decision was entered on July 16, 2001. This Court denied certiorari on February 25, 2002. 534 U.S. 1163 (2002). It was only at that point that petitioner became entitled to challenge under Section 2255 the district court's reliance on the amended Guideline. He had at a minimum one year– *i.e.*, until February 25, 2003 – to do so.

5. Petitioner's Sentencing 2255 Motion: On March 22, 2002, petitioner filed a Section 2255 motion challenging his second sentence. In the sentencing 2255, petitioner raised both his ex post facto argument and the claim that the district court did not have jurisdiction to make additional factual findings in November 2000 because Rule 35 allows a court to correct sentencing errors only within seven days of the date the sentence is orally imposed (in petitioner's case, seven days from February 11, 2000).

a. The district court, the government, and petitioner *all agreed* that the sentencing 2255 was *not* a "second or successive" petition under 28 U.S.C. 2255. As the government explained, citing the Seventh Circuit's decision in *Dahler* v. *United States*, 259 F.3d 763 (2001), "[The] present motion, although numerically [petitioner's] second, is not a 'second or successive' petition requiring prior appellate approval because he attacks sentences (those from his second and third sentencings) other than the sentence attacked by his prior motion." Government's Response to Defendant's

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[2] On remand, the district court entered a sentence of 135 months. Petitioner appealed, and the Seventh Circuit affirmed. A petition for certiorari from the court of appeals' judgment is currently pending as No. 03-16, *Krilich* v. *United States*.

Motion Pursuant to 28 U.S.C. § 2255 To Correct Sentence at 1-2 (Apr. 10, 2002).

The district court denied petitioner's motion. The court held that the ex post facto argument "has been raised and considered on direct appeal, making it unsuitable as a basis for a § 2255 petition unless [petitioner] can demonstrate changed circumstances." Pet. App. 4a. The court also rejected petitioner's argument that the sentencing had been entered in violation of Rule 35 and thus without jurisdiction. The district court concluded that this claim was procedurally defaulted because petitioner had not asserted it on his direct appeal from the resentencing. See *Norris* v. *United States*, 687 F.2d 899, 900 (CA7 1982).

b. Petitioner sought a certificate of appealability. The court of appeals vacated the judgment of the district court and remanded with instructions to dismiss for want of jurisdiction. Pet. App. 2a. That order is the subject of this petition.

The Seventh Circuit concluded that the "district court should not have entertained" petitioner's motion, because it was "his second collateral attack and therefore required this court's approval under 28 U.S.C. §2255 ¶8." Pet. App. 2a. The court acknowledged its holding in *Dahler* v. *United States*, 259 F.3d 763 (2001), that "resentencing resets the counter for purposes of §2255 ¶8" for a collateral attack on "an issue that first arises at the resentencing." Pet. App. 2a. But it reasoned that the ex post facto argument "has been in the case all along" because it "was raised on [petitioner's] initial appeal to this court [*Krilich I*], and it *was* resolved then." *Id.* Accordingly, the court held that "this collateral attack is [petitioner's] second, which does not have (and could not receive) approval under §2255 ¶8 [which requires authorization from the court of appeals to file a successive 2255 application]." *Id.*[3]

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[3] The court of appeals found it "unclear" "[w]hat significance" petitioner's appeal could have, "given that the second sentence was

Petitioner sought rehearing and rehearing en banc. In its answer, the government *conceded* that the critical component of the court of appeals' reasoning – that the ex post facto argument was required to be included in his initial Section 2255 motion because it "was raised on [petitioner's] initial appeal to this court" – was simply wrong. Once again applying the Seventh Circuit's *Dahler* decision, the government acknowledged that "the claims in defendant's second § 2255 motion [including the ex post facto claim] were 'novel to the [first] resentencing.'" Answer of the United States to Petition for Rehearing and Petition for Rehearing En Banc at 10 (Mar. 21, 2003) (quoting *Dahler*, 259 F.3d at 765).

The government nonetheless defended the judgment. As noted, in the district court, the government acknowledged that petitioner's Section 2255 challenge to the sentence on remand was not a successive petition. But in the court of appeals, it reversed that position. The government argued for the first time in its Answer to the Petition for Rehearing that petitioner's sentencing 2255 motion was "second or successive" because petitioner allegedly "could have amended [the conviction 2255 motion] to include the ex post facto claim." Answer of the United States to Petition for Rehearing and Petition for Rehearing En Banc at 10 (Mar. 21, 2003).

Petitioner requested leave to file a reply brief to point out that the factual premise of the government's answer to the rehearing request – *i.e.*, that petitioner could have amended his conviction 2255 motion to include challenges to his sentencing once the sentence had been imposed – was wrong as well. Petitioner sought to point out that his sentencing claims did not become ripe for collateral attack for "months

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vacated more than a year ago." Pet. App. 2a. The answer is that the component of the second sentence challenged by petitioner's timely appeal – the application of the later version of the bribery Guideline – was left unaltered by petitioner's third sentencing.

after the district court denied petitioner's first § 2255 motion." Petitioner's Reply in Support of the Petition for Rehearing with Suggestion for Rehearing *En Banc* at 1 (leave to file denied). But the court of appeals denied the motion.

c. After the Seventh Circuit denied rehearing and rehearing en banc, this petition followed.[4]

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Holding That Petitioner's Section 2255 Motion Was A Prohibited "Second Or Successive" Habeas Application.

Petitioner's sentencing 2255 was not a successive application for the reason given by the court of appeals: Petitioner *could not* have included his sentencing claims in the conviction 2255. Nor was it a successive application for the alternative reason advanced for the first time by the government in opposing rehearing: Those sentencing claims could not be included in any amendment to the conviction 2255 until petitioner's direct appeal of his resentencing concluded with this Court's denial of certiorari on February 25, 2002. By that time, proceedings in the district court on the conviction 2255 were *long concluded*, for the district court denied the conviction 2255 on April 25, 2001. The judgment should accordingly be vacated so that the court of appeals can address the remaining issues presented by petitioner's case.

1. Contrary to the holding of the court of appeals, petitioner's sentencing 2255 motion was not "second or successive" under 28 U.S.C. 2255 ¶ 8. Every court of appeals to consider the question, including the Seventh, has held that

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[4] The court held that petitioner's sentencing 2255 was a successive habeas application and was prohibited for failure to satisfy the requirements of 28 U.S.C. 2255 ¶ 8. Petitioner seeks review of that order, as well as the court of appeals' disposition of his request for a COA.

"a second habeas petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition." *Walker* v. *Roth*, 133 F.3d 454, 455 (CA7 1997). See also *United States* v. *Barrett*, 178 F.3d 34, 44 (CA1 1999), cert. denied, 528 U.S. 1176 (2000); *In re Taylor*, 171 F.3d 185, 187-88 (CA4 1999); *Esposito* v. *United States*, 135 F.3d 111, 113-14 (CA2 1997); *In re Hill*, 113 F.3d 181 (CA11 1997). A collateral attack raising "challenges to events that are novel to the resentencing" (*Dahler* v. *United States*, 259 F.3d 763, 765 (CA7 2001)) is not "second or successive" under Section 2255, even if the defendant has already filed a collateral attack challenging his conviction. See *id.* (collecting cases). The courts uniformly recognize that such "resentencing collateral attacks" should not be treated as "second or successive" because the claims raised "would not have been cognizable at the time of the earlier petition" (*Barrett*, 178 F.3d at 45 (citation omitted)).

The court of appeals recognized that "resentencing resets the counter for purposes of Section 2255 ¶ 8" if the collateral attack "concerns an issue that first arises at the resentencing." Pet. App. 2a (citing *Dahler*, *supra*). The court concluded, however, that in this case petitioner's ex post facto argument "was raised on [petitioner's] initial appeal to this court," and therefore was "in the case all along," including when petitioner's first 2255 motion was filed. *Id.*

That assertion, on which the court of appeals' decision turned entirely, is wrong. Petitioner could not, and therefore did not, present his ex post facto argument to the court of appeals in his "initial appeal." See *United States* v. *Krilich*, 159 F.3d 1020 (CA7 1998), cert. denied, 528 U.S. 810 (1999). The issue arose only when the district court imposed the *second* sentence in this case. Importantly, the government conceded the error in its answer to the petition for rehearing and petition for rehearing en banc, which explained that the sentencing 2255 motion "related exclusively to alleged errors committed at [petitioner's] second sentencing—namely, the reliance on 'loss to the government' at the sentencing on

February 11, 2000, and the district court's alleged fact-finding when it denied [petitioner's] Rule 35(c) motion on November 13, 2000." Answer of the United States to Petition for Rehearing and Petition for Rehearing En Banc at 8 (Mar. 21, 2003).

Indeed, petitioner anticipated and properly addressed this very timing problem when he filed his conviction 2255 motion. Footnote one of that motion read:

> Mr. Krilich and counsel are mindful that claims made pursuant to 28 U.S.C. 2255 should not normally be split and that a petitioner awaiting resentencing should normally wait until the resentencing judgment has become final before attacking the constitutionality of his underlying conviction. *See Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996). This is, however, an unusual case in which bifurcation of issues relating to the underlying conviction, on the one hand, and issues relating to sentencing and resentencing, on the other hand, would appear unavoidable.
>
> First, Mr. Krilich previously sought certiorari to the United States Supreme Court from the decision of the United States Court of Appeals for the Seventh Circuit affirming his conviction. The Supreme Court denied certiorari on October 4, 1999. If Mr. Krilich were to wait to file his initial motion pursuant to 28 U.S.C. § 2255 until the judgment issued in his resentencing proceedings were to become final, the United States would undoubtedly argue that his petition was too late and that he had waived his right to challenge collaterally the constitutionality of his underlying conviction. Mr. Krilich does not want to risk waiver of his claim that his conviction was obtained in violation of his constitutional rights. Second, Mr. Krilich cannot raise his claims relating to his sentencing, as those proceedings are not yet completed and any constitutional errors that may have

> occurred are not ripe for review. Thus, Mr. Krilich cannot join those issues in this petition.
>
> If this Court determines that Mr. Krilich's challenge to his conviction is premature and should await the issuance of a judgment upon resentencing and/or that judgment becoming final, Mr. Krilich and his counsel request that this Court either stay the proceedings on this motion until that time or dismiss the motion with leave to refile as an initial motion pursuant to [28] U.S.C. 2255 at a later time. In this manner, should this filing be deemed premature, Mr. Krilich will not be prevented from seeking appropriate post-conviction relief by the bar against second and successive Section 2255 motions set by the Anti-Terrorism and Effective Death Penalty Act of 1996.

Motion Pursuant to 28 U.S.C. § 2255 To Vacate, Set Aside and Correct Sentence at 2 n.1 (Oct. 3, 2000).

The district court neither stayed the proceedings nor dismissed the motion with leave to refile. Thus, at the time petitioner filed his sentencing 2255 motion, the court, the government, and petitioner all agreed that the motion was not second or successive. That understanding was correct. See *Dahler*, 259 F.3d at 765. The Seventh Circuit reached the contrary conclusion based on a fundamental misunderstanding of the procedural history of this case that all the parties had pointed out.

2. The alternative defense of the court of appeals' judgment offered by the government in its response to petitioner's rehearing request below fares no better. The government argued for the first time that petitioner's sentencing 2255 motion was a successive application because he should have amended his conviction 2255 motion. The government thus reversed the position it had taken in the district court. There, it had conceded that the sentencing 2255 was "not a 'second or successive' petition requiring prior appellate approval because [the sentencing 2255] attacks

sentences (those from his second and third sentencings) other than the sentence attacked by his prior motion." Response 2 (citing *Dahler*, *supra*).

The government's revised position is wrong. Petitioner could have amended the conviction 2255 motion only before the date on which the district court denied that motion - *i.e.*, April 5, 2001, or at the very latest before the date that court denied a certificate of appealability – *i.e.*, July 11, 2001. But petitioner *could not* seek 2255 relief from the second sentence until this Court denied certiorari on direct appeal of the second sentence *eleven months later* on February 25, 2002. "It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending." Brief for the United States, *Clay* v. *United States*, 123 S. Ct. 1072 (2003), at 22 (No. 01-1500). See *Kapral* v. *United States*, 166 F.3d 565, 572 (CA3 1999) (collecting cases); see also Rule 5, Rules Governing Section 2255 Proceedings, Advisory Committee Note (1997) (Section 2255 motion "is inappropriate if the movant is simultaneously appealing the decision."). And petitioner was not even required to file his sentencing 2255 motion until February 25, 2003. See 28 U.S.C. 2255 ¶ 6.

3. Petitioner accordingly respectfully requests that this Court grant the petition and remand the case to the Seventh Circuit for consideration of petitioner's remaining legal arguments, which were not considered by the court of appeals in the first instance. Petitioner notes that the Court may find it appropriate to remand for further consideration in light of *Clay* v. *United States*, 123 S. Ct. 1072 (decided March 4, 2003). In *Clay*, which was decided several months after the Seventh Circuit's ruling in this case, this Court for the first time specified that the time to file a Section 2255 motion begins to run after this Court denies certiorari on direct appeal. *Id.* at 1077 n.4. A remand for further consideration in light of *Clay*, combined with the government's recognition in this Court that petitioner was not obliged (indeed, was not permitted) to amend his conviction 2255 in the circumstances

of this case, would permit the Seventh Circuit to correct its error and resolve the remaining issues presented by petitioner's case.

* * * *

This Court's practice has been to resolve only questions actually decided by the court of appeals, leaving additional issues for consideration in the first instance on remand. See *Rose* v. *Clark*, 478 U.S. 570, 583 (1986); *Wood* v. *Strickland*, 420 U.S. 308, 327 (1975). Further, "[t]he possibility that the court of appeals might arrive at the same judgment after a remand is not a reason for this Court to decline to resolve" a case. Cert. Reply of the United States as Amicus Curiae, *Yates* v. *Hendon*, No. 02-458, at 20 n.7. But should the Court decide to grant certiorari to address the remaining issues in the case, it should direct the parties to brief the following two issues, both of which present important circuit conflicts:

- Does Rule 35's seven-day time limit for correcting a sentence for "arithmetical, technical, or other clear error" run from the date the sentence was orally pronounced (as the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits hold) or from the date the judgment was entered (as the First and Seventh Circuits hold)?
- Is a jurisdictional challenge to a defendant's Section 2255 sentence procedurally defaulted if not raised on direct appeal?

II. The District Court's Ruling That It Had Jurisdiction To Make New Factual Findings Regarding Petitioner's Sentence Nine Months After The Sentence Was Orally Imposed Under Fed. R. Crim. P. 35 Conflicts With The Views Of Other Circuits And Is Incorrect.

Certiorari could be granted in this case to resolve an important and recurring question of federal sentencing law on which the courts of appeals are irreconcilably divided: Does

Rule 35's seven-day time limit for correcting a sentence for "arithmetical, technical, or other clear error" run from the date the sentence was orally pronounced (as the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits hold) or from the date the judgment was entered (as the First and Seventh Circuits hold)? This question affects the jurisdiction of the district court to correct sentencing errors in every federal criminal proceeding, and the Seventh Circuit has declined to reconsider its position in light of the split. Certiorari would be warranted to resolve the conflict.

Rule 35 provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a).[5] The Seventh Circuit holds that under Rule 35 a district court may correct a sentence within seven days of the "date judgment enters rather than the date sentence is orally pronounced." *United States* v. *Clay*, 37 F.3d 338, 340 (1994). The Seventh Circuit reasons that this interpretation of the term "sentencing" is most consistent with Federal Rule of Appellate Procedure 4(b), which runs the time for filing an appeal from the date judgment is entered in the docket. *United States* v. *De La Torre*, 327 F.3d 605, 609 (2003). Thus, under Seventh Circuit precedent, the district court had jurisdiction to make new factual findings regarding petitioner's sentence more than nine months after the sentence was orally imposed pursuant to Rule 35.

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[5] Rule 35 was amended in 2002 "as part of the general restyling of the Criminal Rules." Fed. R. Crim. P. 35 Advisory Comm. Notes. At the time petitioner was sentenced, the rule governing the time limit for correcting a sentence was Rule 35(c), which read, "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." As the Advisory Committee Notes to the 2002 Amendment explicitly states, "No change in practice is intended by" this change in language.

The First Circuit agrees in dictum. *United States* v. *Morillo*, 8 F.3d 864, 869 n.8 (1993); see also *United States* v. *Fahm*, 13 F.3d 447, 453 (1994). Every other circuit to consider the question, however, has reached the contrary conclusion. See *De La Torre*, 327 F.3d at 609 n.3 (noting split). In *United States* v. *Townsend*, 33 F.3d 1230 (1994), the Tenth Circuit held that "sentence is imposed upon a criminal defendant" for purposes of Rule 35 "when the court orally pronounces sentence from the bench," rather than the date the judgment enters, *id.* at 1231. The court noted that this interpretation is most consistent with the "well established" rule that "a sentence orally imposed governs a conflicting, later-written sentence of the court." *Id.* This rule is "grounded in the Sixth Amendment," which "requires that a defendant be physically present at sentencing." *Id.* Thus, the court concluded, Congress could not have meant the term "imposition of sentence" to refer to the official entry of a judgment of conviction, at which "only members of the clerk's office are present." *Id.*

The Tenth Circuit's holding was subsequently adopted by the Second Circuit in *United States* v. *Abreu-Cabrera*, 64 F.3d 67 (1995). The *Abreu-Cabrera* court noted the conflict between the Seventh and Tenth Circuits and concluded that the Tenth Circuit's interpretation "best effectuates the intent of the rule's drafters—finality in sentencing." *Id.* at 74. The Seventh Circuit's rule "would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a change of heart, and alter the sentence," a sequence of events the Second Circuit believed to be "beyond what the rule was meant to allow." *Id.*

Two years later, the Fourth Circuit joined the Second and Tenth Circuits in *United States* v. *Layman*, 116 F.3d 105, 108 (1997), cert. denied, 522 U.S. 1107 (1998). The court in *Layman* rejected the Seventh Circuit's holding in *Clay* (*id.*), accepting instead both the Tenth Circuit's Sixth Amendment argument and the Second Circuit's reasoning that its interpretation "better promotes the goal of finality in

sentencing." *Id.* at 108-09 (citing *Abreu-Cabrera*, 64 F.3d at 74; *Clay*, 37 F.3d at 340; *Townsend*, 33 F.3d at 1231). Subsequently, the Fifth, Ninth, and Eleventh Circuits adopted this position as well. *United States* v. *Aguirre*, 214 F.3d 1122, 1125-26 (CA9), cert. denied, 531 U.S. 970 (2000); *United States* v. *Morrison*, 204 F.3d 1091, 1093 (CA11 2000); *United States* v. *Gonzalez*, 163 F.3d 255, 264 (CA5 1998).

Importantly, the federal government has expressed its agreement with the holding of the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits on which petitioner relies. See *De La Torre*, 327 F.3d at 608 n.3 (rejecting the government's argument that "the seven-day window [of Rule 35] begins to run on the date the sentence was orally imposed"); *United States* v. *Wisch*, 275 F.3d 620, 626 (CA7 2001) (similar); *Layman*, 116 F.3d at 108 ("The Government argues that sentence was imposed on Layman when the district court orally pronounced it during the May 17 hearing.").

The conflict over the proper interpretation of Rule 35 was outcome-determinative in this case. Because under the majority rule the district court was without jurisdiction under Rule 35 to make new factual findings regarding petitioner's sentence nine months after it was orally imposed, petitioner's sentence was made under the court's original factual findings in violation of the Ex Post Facto Clause.

The district court sentenced petitioner to 87 months' imprisonment based on the testimony of the government's expert witness regarding the loss to the government resulting from petitioner's conduct. "Crediting and relying only on" testimony related to "the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to [petitioner])," the court "announced [petitioner's] sentence" on February 11, 2000 and entered its judgment on November 1, 2000. Pet. App. 11a. Over nine months after the district court orally imposed petitioner's sentence, it made

the new factual finding (acting on its authority under Rule 35) that "the benefit to" petitioner of his offense conduct "was approximately $14 million." *Id.* 9a.

On appeal, petitioner argued that his sentence violated the Ex Post Facto Clause, since "loss to the government" was not added as a ground for enhancement under the Sentencing Guidelines until November 1, 1991, after petitioner's offenses occurred. The court of appeals rejected this argument based on the district court's factual finding in November 2000 that "the gain [to petitioner] was $14 million." 257 F.3d 689, 692 (2001). Under the rule of the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits, however, petitioner's sentence could not have been based on his gain or benefit, because the district court was without jurisdiction to correct petitioner's sentence under Rule 35 nine months after the sentence was orally imposed. Thus, under the majority rule, petitioner's sentence would have to have been based on the district court's original findings of actual or intended loss to the government, in violation of the Ex Post Facto Clause.

On remand in this case, petitioner will invite the Seventh Circuit to reconsider its construction of Rule 35 en banc. Alternatively, this Court's intervention would be warranted at this time.

III. The District Court's Decision That A Jurisdictional Argument Is Subject To The Rules Of Procedural Default Conflicts With The Views Of Other Circuits And Is Incorrect.

The district court concluded that petitioner procedurally defaulted his argument that the sentencing court lacked jurisdiction to make new factual findings in November 2000. (As noted, the court of appeals did not accept this conclusion on petitioner's appeal; rather than affirming, the court of appeals *vacated* the district court's order.) The district court relied on the fact that petitioner had not asserted on direct appeal from the second sentence that the district court lacked authority under Fed. R. Crim. P. 35 to enter its order. The

district court's ruling was incorrect because petitioner's argument goes to the subject-matter jurisdiction of the sentencing court and therefore cannot be procedurally defaulted. In any event, the district court decision is in conflict with the Eleventh Circuit's view that any jurisdiction argument, not only a subject-matter jurisdiction argument, cannot be procedurally defaulted.

The district court's finding of default rested on the Seventh Circuit's decision in *United States* v. *Ceballos*, 302 F.3d 679 (2002), cert. denied, 123 S. Ct. 925 (2003). The Seventh Circuit's position is that rules governing "a court's authority to issue a specific type of remedy" or a court's "power to impose penalties after substantive violations have occurred" (*id. at* 692) should not be characterized as "jurisdictional" and therefore arguments based on such rules are subject to procedural default. Thus, in *Ceballos*, the court concluded that 21 U.S.C. 851(a)(1), which requires the government to inform the court and defense counsel "before trial" of information related to a defendant's prior convictions that it intends to present at sentencing, is not a "jurisdictional" requirement. 302 F.3d at 692. The court reasoned that "the district court clearly had subject-matter jurisdiction over" the defendant's "prosecution pursuant to 18 U.S.C. 3231," and "once subject-matter jurisdiction has properly attached," a Section 851(a)(1) error does not result in "loss of jurisdiction." *Id.* at 691 (internal quotation marks omitted).

The First and Eighth Circuits agree with the Seventh Circuit's view that only claims based on a lack of subject-matter jurisdiction are excused from the requirements of procedural default. Thus, in *Prou* v. *United States*, 199 F.3d 37 (1999), the First Circuit held that a Section 851(a)(1) error not raised on direct appeal could not be brought on collateral attack. The court acknowledged that "jurisdictional failings are immune from normal rules of waiver and procedural default" (*id.* at 42), but concluded that this rule applies only to failings of subject-matter jurisdiction: "Once subject-matter jurisdiction has properly attached, courts may exceed their

authority or otherwise err without loss of jurisdiction." *Id.* at 45. And in *United States* v. *Mooring*, 287 F.3d 725, cert. denied, 123 S. Ct. 259 (2002), the Eighth Circuit concluded that because a Section 851(a)(1) error does not affect a court's subject-matter jurisdiction, the error may not be "raised on collateral review without being subjected to procedural default analysis." *Id.* at 727-28 (citing *Prou*, 199 F.3d at 45). Thus, in the First, Seventh, and Eighth Circuits, only a claim that challenges the court's *subject-matter* jurisdiction is exempt from procedural default. Jurisdictional challenges based on rules that affect "district courts' power to impose penalties after substantive violations have occurred" or "a court's authority to issue a specific type of remedy" (*Ceballos*, 302 F.3d at 692), are subject to the usual requirements of procedural default.

The Eleventh Circuit disagrees. In *Harris* v. *United States*, 149 F.3d 1304 (1998), the court held that a Section 851(a)(1) violation is a "jurisdictional defect" that "cannot be procedurally defaulted." *Id.* at 1308-09. The Eleventh Circuit reasoned that a federal court, as a court of "limited jurisdiction," cannot "derive power to act from the actions of the parties," and therefore "parties are incapable of conferring upon" the court a "jurisdictional foundation we otherwise lack simply by waiver or procedural default." *Id.* at 1308. Thus, on the Eleventh Circuit's view, *any* "jurisdictional defect," not only one that goes to subject-matter jurisdiction, cannot be procedurally defaulted. Rule 35, like Section 851(a)(1), governs a court's "authority to issue a specific type of remedy" or "power to impose penalties after substantive violations have occurred" (*Ceballos*, 302 F.3d at 692), and therefore claims based on Rule 35 would not be held procedurally defaulted in the Eleventh Circuit.[6]

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[6] Two other courts of appeals, the Sixth and Tenth, have characterized Section 851(a)(1) as a "jurisdictional requirement," although they have not specifically addressed the question whether procedural default applies to Section 851(a)(1) claims. *United*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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